Supreme Court, U.S.
FILED

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NO_____

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY MOON,
Petitioner

v

HARRISON PIPING SUPPLY,
MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND,
MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, and DR. ASIT RAY,
Respondents

PETITION FOR WRIT OF CERTIORARI

Marshall Lasser
MARSHALL LASSER PC
Attorney for Petitioner
P.O. Box 2579
Southfield MI 48037
248-647-7722

QUESTION PRESENTED

MAY A CIVIL RICO CASE BROUGHT BY A SINGLE PLAINTIFF BE DISMISSED UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) ON THE GROUND HIS CLAIMS OF FRAUD FAILED TO PLEAD "CONTINUITY" OF A "PATTERN OF RACKETEERING," WHERE HE ALLEGED NOT ONLY FRAUD AGAINST HIMSELF BUT ALSO FRAUD AGAINST OTHERS, AND A THREAT OF CONTINUING FRAUD AGAINST HIMSELF AND OTHERS?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

PLAINTIFF

Timothy Moon

DEFENDANTS

Harrison Piping Supply, Michigan Tooling Association Workers Compensation Fund, Michigan Tooling Association Service Company, and Dr. Asit Ray

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TIMOTHY MOON, Plaintiff-Appellant v HARRISON PIPING SUPPLY, MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, and DR. ASIT RAY, Defendants-Appellees, *Opinion Decided and Filed Sept. 28, 2006*

TIMOTHY MOON, Plaintiff v HARRISON PIPING SUPPLY, a MI corporation, MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, a MI corporation, MICHIGAN TOOLING ASSOCIATION SERVICE COMPANY, a MI corporation, and DR. ASIT RAY, Defendants, *AMENDED OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT UNDER RULE 12(b)(6)*, May 17, 2005

BASIS FOR JURISDICTION

1. The judgement of the Court of Appeals was entered September 28, 2006.

2. Jurisdiction to review this writ exists under 28 U.S.C. §2101

THE STATUTES INVOLVED IN THE CASE

Federal: The Racketeer Influenced Corrupt Organization Act (RICO) sections 18 U.S.C. 1961 and 18 U.S.C. 1962(c); 18 U.S.C. §1341 (relating to mail fraud), 18 U.S.C. §1343 (relating to wire fraud)

State: Michigan Workers Disability Compensation Act, MCL 418.101 et seq, sections 301, 385,

STATEMENT OF THE CASE

This case presents a major question arising under the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et. seq. (RICO):

> May a civil RICO case brought by a single plaintiff be dismissed under federal rule of civil procedure Rule 12(B)(6) on the ground his claims of fraud failed to plead "continuity" of a "pattern of racketeering," where he alleged not only fraud against himself but also fraud against others, and a threat of continuing fraud against himself and others?

Mr. Moon brought suit in the United States District Court for the Eastern District of Michigan, alleging a civil RICO cause of action under 18 U.S.C. §1962(c), which provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise... to conduct or participate... directly in the conduct of such enterprise's affairs through a pattern of racketeering activity...

Section 1961 of RICO defines "racketeering activity" to include "any act which is indictable under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)....."

This Court in *H. J. Inc. v Northwestern Bell Telephone Company*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), held that RICO requires plaintiff or prosecutor to show "continuity" to prove a "pattern of racketeering." Continuity is "both a closed- and open-ended concept, referring either to a closed period of

repeated conduct, or to past conduct that by its nature projects in the future with a threat of repetition." *Id*, 492 U.S. at 242, 109 S. Ct. at 2902. The Court provided a few guides but no test for determining whether closed-ended and open-ended continuity was present, stating, "The development of these concepts must await future cases..." *Id*, 492 US at 243ff, 109 S Ct at 2903, 106 L. Ed. 2d at This petition presents a "future case" suitable for development of the concepts of closed- and open-ended continuity.

Mr. Moon's pleadings alleged facts meeting *H. J. Inc.'s* requirements both for closed-ended and open-ended continuity. However, the trial court dismissed his complaint under Rule 12(b)(6), and the dismissal was affirmed by the Court of Appeals on the ground the complaint failed to allege either closed- or open-ended continuity. Plaintiff's petition should be granted because "a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Supreme Court Rule 10(c))

Plaintiff pled allegations of fraud against others "based on information and belief, [which] are likely to have evidentiary support after a reasonable opportunity for investigation and discovery." This invocation of Rule 11(b)(3) should have led the Court of Appeals to "relax" the rules of pleading fraud in a civil RICO case, under *Rotella v Wood*, 528 U.S. 549, 560, 120 S Ct 1075, 1083, 145 L Ed 2d 1047 (2000). The Court of Appeals did not follow *Rotella*. Again, "a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court" (Supreme Court Rule 10(c)). This petition presents a suitable case for explaining the degree to which civil RICO fraud pleadings are "relaxed" when Rule 11(b)(3) is invoked.

Facts. Timothy Moon was injured on the job while working for Harrison Piping Supply, entitling him to workers compensation benefits under Michigan's Workers Disability Compensation Act ("WDCA") from

Harrison and its insurer Michigan Tooling Association ("MTA"). The benefits consisted of weekly wage loss checks and payment of medical care for his injuries.

Mr. Moon alleged a pattern of racketeering by defendants to fraudulently deprive him of his benefits. This pattern used the mails in two ways:

> (1) MTA, acting in concert with Harrison, mailed three fraudulent Notices of Dispute to him and to the Michigan Workers Compensation Agency, which administers the WDCA; the Notice of Dispute is a form which an insurer is required to file with the Agency when it terminates or denies benefits. The Notices of Dispute gave false explanations for the denial or termination of Mr. Moon's benefits. Upon mailing of each Notice of Dispute, MTA terminated benefits. MTA fraudulently terminated benefits three times over a period of 30 months. (After two of the three terminations, benefits were eventually reinstated.)
>
> (2) MTA, acting in concert with employer Harrison, obtained and mailed a false medical report from Dr. Asit Ray. MTA cited this false medical report in one of the Notices of Dispute as the basis for terminating benefits. MTA also submitted the false report to an Agency magistrate at a hearing held to determine whether Mr. Moon was disabled.

The decision of an Agency magistrate on the issue of a claimant's disability is res judicata only as to the claimant's condition on and before the date of the hearing. After the magistrate issues a decision, either the worker or the insurer may start another proceeding, asserting the claimant's disability status has changed, and another hearing will be held. Because the WDCA allows an Agency magistrate to hold hearings from time

to time to redetermine the issue of a claimant's disability, MTA might in the future commit other acts of fraud by obtaining and mailing other false reports from Dr. Ray or another physician.

Mr. Moon alleged defendants' acts involved mail fraud in violation of 18 U.S.C. §1341.[1] Plaintiff claimed defendants' fraudulent acts directly injured him because upon the mailing of the Notices of Dispute, MTA cut off his workers compensation benefits three times, each cut-off causing him loss of benefits and attorney expense to recover them.

Mr. Moon further alleged defendants defrauded other workers of their workers compensation benefits, and threatened continuing racketeering activity against employees of Harrison who will become entitled to Michigan workers compensation benefits. Plaintiff did not identify the workers whom defendants had allegedly defrauded, but invoked FRCP 11(b)(3) and pled "these allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery."

Defendants filed motions to dismiss under Rule 12(b)(6), asserting various grounds. The motions were granted on several grounds by the District Court, including that plaintiff's pleadings failed to allege a pattern of racketeering. The dismissal was affirmed by the Court of Appeals on the ground that plaintiff failed to allege a pattern of racketeering because his pleadings failed to demonstrate either closed-ended or open-ended continuity.

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1. Plaintiff's allegations and arguments throughout this brief are intended to apply to both the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, but for brevity plaintiff will use only the term "mail fraud."

Basis for Federal Jurisdiction in the District Court

Federal question jurisdiction is conferred on plaintiffs' claims by the Federal Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 U.S.C. §1332 (plaintiffs are citizens of Michigan, defendants are citizens of other states, and the amounts in controversy exceed $75,000).

ARGUMENT

Background and Procedural History

Timothy Moon alleged in his First Amended Complaint (Apx 100) that he was injured on the job while working for Harrison Piping Supply, entitling him to workers compensation benefits under Michigan's WDCA from Harrison and its insurer, MTA. Section 301(1) of the WDCA, MCL 418.301(1), provides that an "employee who receives a personal injury arising out of the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." (Apx 86)

A claims adjuster seeking to deny or terminate an employee's benefits must file a Notice of Dispute with the Workers Compensation Agency (formerly the Bureau of Workers Disability Compensation) and send a copy to the employee. The manner and method of disputing a claim via a Notice of Dispute is set out in Michigan Administrative Rule R408.33:

> Rule 3 (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier... shall notify the bureau, on form 107, if the right of the injured employee or dependant

to compensation is disputed.... A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

A Notice of Dispute form is in the Appendix at 89.

§1962(c) of RICO provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise... to conduct or participate... directly in the conduct of such enterprise's affairs through a pattern of racketeering activity...

Plaintiff brought suit pursuant to §1964(c) of RICO, which provides in part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee... (Apx 78)

Plaintiff alleged defendants formed an "enterprise" which fraudulently deprived him of his workers compensation benefits through a series of "predicate acts" which formed a "pattern of racketeering activity" in violation of §1962(c). §1961(1) of RICO defines "racketeering activity" to include "any act which is indictable" under the mail and wire fraud provisions of title 18 of the United States Code, §§1341 and 1343.

Plaintiff's First Amended Complaint alleged in part:

> 6. One or more of [defendants] committed... mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished by use of the United States

mails and by electronic communications in violation of 18 USC 1341 and 1343... These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

7. On October 23, 2000, plaintiff suffered an injury while working for Harrison Piping Supply, which permanently disabled him from working in unrestricted manual labor.

8. Defendants paid workers compensation for that injury until they suspended benefits in October 2001, forcing plaintiff to undergo the expense of hiring an attorney . After litigating the case, they agreed to reinstate benefits by a voluntary payment agreement dated Oct 14, 2002.

9. After benefits were reinstated, the following events occurred, which demonstrated a pattern of racketeering conduct, consisting of two or more predicate acts:

a. In 2003, defendants had plaintiff examined by a doctor of their choice, Dr. Brent Smith.

b. Defendant's doctor, Smith, determined plaintiff could do a truck driving job limited to 8 hours work per day and no lifting over 40 lbs.

c. Defendants terminated workers compensation benefits on July 24, 2003, giving as the reason, "claimant fully released to job." This statement was contained within a Notice of Dispute mailed via the United States mailed by Cindy Jackson, an employee of the Fund, from Farmington Hills, MI, to plaintiff in

Taylor MI, on July 24, 2003. This statement was fraudulent because defendants knew that defendants' examiner, Dr. Smith had written that plaintiff was *not* fully released to his job at time of injury, and that plaintiff's treating physician, Dr. Alfredo Balarezo, had written that plaintiff was not fully released. (Plaintiff's job at time of injury required lifting over 40lbs and required him to drive over 8 hours per day from time to time.)

d. Plaintiff asked Harrison Piping to take him back to work within his restrictions. Ray Dido of Harrison refused to take plaintiff back to work.

e. On March 25, 2004, the date set for trial in plaintiff's workers compensation case, defendants reinstated plaintiff's workers compensation benefits.

f. On or even before the same date defendants reinstated plaintiff's workers compensation, defendants conspired to again terminate plaintiff's workers compensation benefits. On the same date defendants agreed to reinstate plaintiff's workers compensation benefits, defendants sent to plaintiff via the US mail a notice of examination by Dr. Asit Ray... The notice was part of a scheme by defendants to fraudulently deprive plaintiff of his workers compensation benefits, because the purpose of the examination was not to obtain an objective determination of whether plaintiff was disabled by a work-related condition, but to obtain a "cut off" medical report that defendants could use to terminate plaintiff's benefits regardless of the true nature of his physical condition.

Dr. Ray was known to defendants... as a doctor who could be relied upon to write "cut off" reports in workers compensation cases; defendants and/or their attorney had relied upon him in the past to issue "cut off" reports. Defendants expressly or tacitly communicated to Dr. Ray that it wanted to obtain a "cut off" medical report, and Dr. Ray knew that he was not to perform an objective examination of plaintiff. On April 8, 2004, Dr. Ray examined plaintiff and wrote a report stating that plaintiff was no longer disabled due to a work related condition. Dr. Ray examined and reported on plaintiff not with the purpose of objectively determining whether plaintiff had a work related disability, but for the fraudulent purpose of providing the corporate defendants with a "cut off" report upon which they could rely in cutting off plaintiff's workers compensation benefits. This report was mailed via the US mail...

15. Defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act. The members of the enterprise engaged, in this case, in the pattern of racketeering described above in para. 9. Dr. Ray became part of the enterprise by his actions, described above. *On information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.*

> 16. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, *demonstrating and involving a threat of continuing racketeering activity against employees of Harrison who are entitled to Michigan workers compensation benefits.* [Apx 100, emphasis supplied]

Plaintiff also pled a state law claim not involved in this appeal.

Defendants filed motions to dismiss under Rule 12(b)(6), asserting various grounds. Before the motions were heard, plaintiff moved for leave to file a Second Amended Complaint. The proposed complaint described in greater detail the 2001 cut-off of benefits alleged in paragraph 8 of the First Amended Complaint, and for the first time specifically identified that cut-off as a mail fraud violation:

> 8. Defendants paid workers compensation for that injury until they suspended benefits on or about September 4, 2001. On Sept. 12, 2001, claim adjuster Cindy Jackson of defendant Michigan Tooling Association Service Company ("Service Company") sent by US mail to Timothy Moon at 8212 Margaret, Taylor, MI, a NOTICE OF DISPUTE which denied liability for workers compensation benefits to plaintiff and stated, "DATE OF INJURY DOES NOT FALL WITHIN OUR COVERAGE PERIOD OF 11-1-00 TO PRESENT. LIABILITY BELONGS TO AMERISURE PER 408.34(2)". This communication was fraudulent because the Service Company and the Michigan Tooling Association admitted on 10/21/02 they did insure plaintiff and other employees of

> Harrison Piping for workers compensation claims beginning on October 1, 2000, including plaintiff's injury of October 23, 2000. This fraudulent act, in violation of 18 USC 1341 and 1343, forced plaintiff to undergo the expense of hiring an attorney. After litigating the case, defendants agreed to reinstate benefits by a voluntary payment agreement dated Oct 14, 2002.... [Apx 90]

The motion for leave to file the Second Amended Complaint was granted by a magistrate judge, contingent upon the district judge denying the motions to dismiss. (Apx 77). This order was not appealed to the district judge.

Defendants' motions to dismiss were granted on several grounds by the District Court, including the ground that plaintiff's pleadings failed to allege a pattern of racketeering (Apx 20). The dismissal of the RICO cause of action was affirmed by the Court of Appeals (Apx 1) on the sole ground that plaintiff failed to allege a pattern of racketeering because his pleadings failed to demonstrate either closed-ended or open-ended continuity. Mr. Moon appeals the Rule 12(b)(6) dismissal of his case.

ARGUMENT

THIS COURT SHOULD CLARIFY THE CONCEPTS OF CLOSED-ENDED AND OPEN-ENDED CONTINUITY ANNOUNCED IN *H. J. INC.* AND THE CONCEPT OF "RELAXATION" OF FRAUD PLEADING ANNOUNCED IN *ROTELLA*.

A. OPEN-ENDED CONTINUITY

"'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects in the future with a threat of repetition." *H. J. Inc., supra, Id*, 492 U.S. at 242, 109 S. Ct. at 2902. After presenting these definitions, *H. J. Inc.* provided minimal guidance for determining whether open-ended continuity is present, "preferring to deal with this issue in the context of concrete factual situations presented for decision..." *Id*, 492 U.S. at 242, 109 S. Ct. at 2902. The Court of appeals misreading in this case of *H. J. Inc.* demonstrates the need for clarification of the concepts.

Concerning open-ended continuity, the Court did provide this guideline:

> "A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit." *Id*, 492 U.S. at 242, 109 S. Ct. At 2902.

Mr. Moon's allegations fit this pattern, yet the Court of Appeals held they did not. Mr. Moon described three predicate acts of mail fraud against him in 30 months, alleged defendants committed mail fraud against other workers compensation claimants, and *pled that defendants threatened more fraud against him and other*

claimants.

With regard to the fraud committed against him, the First Amended Complaint paragraph 9 described two predicate acts (involving the 2003 and 2004 cut offs of benefits), and the Second Amended Complaint described a third (involving the 2001 cut off).

With regard to past fraud against other workers compensation claimants, plaintiff alleged:

> ....On information and belief, one or more members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits. (paragraph 15 of the First Amended Complaint)

And:

> Defendants sent to plaintiff via the US mail a notice of examination by Dr. Asit Ray... The notice was part of a-scheme by defendants to fraudulently deprive plaintiff of his workers compensation benefits, because the purpose of the examination was not to obtain an objective determination of whether plaintiff was disabled by a work-related condition, but to obtain a "cut off" medical report that defendants could use to terminate plaintiff's benefits regardless of the true nature of his physical condition. Dr. Ray was known to defendants... as a doctor who could be relied upon to write "cut off" reports in workers compensation cases; *defendants... had relied upon him in the past to issue "cut off" reports.* [Paragraph 9f, emphasis supplied]

With regard to the threat of future fraud against him and others at Harrison, plaintiff alleged in para. 16 of the First Amended Complaint:

> Defendants used the Postal Service and the wires for interstate

> communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of Harrison who are entitled to Michigan workers compensation benefits. [Emphasis supplied]

This combination of past fraud and threatened future fraud has "surely... established" the continuity element, at least at the pleading stage. Perhaps plaintiff will be unable to prove his allegations, but they may not be dismissed under Rule 12(b)(6) because a court is doubtful they can be proved. "[W]e may only affirm the dismissal of the complaint only if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H. J. Inc.*, 492 U.S. at 249, 109 S. Ct. at 2906.

Nor can the allegations be dismissed because plaintiff cannot yet supply details of the frauds committed against others. He has invoked Rule 11(b)(3), pleading allegations "based on information and belief, [which] are likely to have evidentiary support after a reasonable opportunity for investigation and discovery." The constraints of pleading fraud are "relaxed" where this rule is invoked, *Rotella v Wood*, 528 U.S. 549, 560, 120 S Ct 1075, 1083, 145 L Ed 2d 1047 (2000).

In holding Mr. Moon failed to plead open-ended continuity, the Court of Appeals mistakenly said:

> All of the predicate acts .... were keyed to Defendants' single objective of depriving Moon of his benefits. No other schemes, purposes or injuries are alleged... (Apx 6)

The Court of Appeals ignored the allegations of paragraphs 9f, 15 and 16 of the First Amended Complaint that *other claimants* had been defrauded by false medical reports from Dr. Ray and by other predicate acts committed by Harrison and Michigan Tooling Association, *and that defendants threatened future fraud against plaintiff and others*. These allegations create open-ended continuity. At the very least, they

sufficiently pled continuity to withstand a motion brought under Rule 12(b)(6).[2]

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3. The Court of Appeals noted correctly that if Mr. Moon won his hearing before the Agency, defendants "could no longer suspend Moon's benefits through issuing Notices of Dispute, but would instead have to file a petition with the Bureau to stop their payments to Moon and prove that he is no longer entitled to them. Mich Admin. Code R. 408.40 (2006)." (Apx 6) However, the Court failed to note that defendants could still, under §385 of the WDCA (MCL 418.385), send Mr. Moon to Dr. Ray or another cut-off doctor and obtain a fraudulent report which it could then submit to the Agency prove he is no longer entitled to benefits.

After this RICO case was filed, the Agency magistrate denied plaintiff's claim for worker's compensation benefits, based on the MTA's cut off of benefits which relied on Dr. Ray's report. The magistrate adopted Dr. Ray's report and deposition testimony over that of plaintiff's doctors. However, plaintiff, like any other workers compensation claimant, was not permitted to discover whether an expert's report and testimony is the product of fraud involving expert and insurer. He cannot subpena records relating to that fraud. He cannot take depositions. He cannot gather or present proof showing how often the insurer has hired the expert, or how much the insurer has paid him, or whether the expert has always testified favorably for the insurer. General discovery is not available in a workers compensation case, and certainly not discovery of whether the examining doctor colluded with the insurer which hired him, *Stokes v DaimlerChrysler Corporation*, ___ Mich App ___ (Court of Appeals 268544, Oct. 26, 2006) ("the magistrate's authority is not derived from the broad discovery rules set forth in the Michigan Court Rules.")

This Court said in *H. J. Inc.* that "proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity...." 492 U.S. at 240, 109 S. Ct. At 2901, 106 L. Ed. 2d at 208. The Sixth Circuit's decision prevented plaintiff from proving defendants' involvement in multiple criminal schemes. The Court of Appeals prematurely dismissed plaintiff's complaint, before he could discover proof of continuity.

The Court of Appeal's dismissal violates *H. J. Inc's* sketchy guidelines for interpreting open-ended continuity. The error demonstrates the need to add more detail to that sketch. *The Court should use this case to clarify the concept of open-ended continuity.*

B. CLOSED-ENDED CONTINUITY

The Court of Appeals also mistakenly held that plaintiff failed to allege closed-end continuity:

> In any event, even if the racketeering activity lasted for two-and-a-half years, as Moon insists, facts establishing a closed period of continuity are still lacking. Moon has pleaded that the Defendants embarked upon a coordinated scheme to wrongfully terminate his workers' compensation benefits.... *No other schemes, purposes, or injuries are alleged, and there are no facts suggesting that the scheme would continue beyond the Defendants' accomplishing their goal of terminating Moon's benefits.* (Apx 5, emphasis supplied)

The Court of Appeals erred. Plaintiff alleged defendants defrauded *other* workers compensation claimants (First Amended Complaint paragraphs 9f, 15 and 16). Under *H. J. Inc.*, plaintiff pled closed-ended continuity.

Plaintiff also sought discovery of other predicate

acts committed against him. He alleged in the First Amended Complaint:

> 6. One or more of [defendants] committed... mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343... These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

Under Rule 11(b)(3), and *Rotella*, supra, which provides for "relaxation" of Rule 9's fraud pleading requirements where Rule 11(b)(3) is invoked, dismissal for failure to allege continuity was premature.

Also, plaintiff cited in his appellate brief §385 of the WDCA, MCL 481.385, which allows Defendants to make him submit periodically to examination by a physician of the defendants' choice, thus "suggesting" that "the scheme would continue" even if he won at the workers compensation hearing which was pending before an Agency magistrate at the time the District Court dismissed the RICO case. *At any time* after the magistrate's decision, the defendants could have plaintiff examined by Dr. Ray or another "cut off" doctor, obtain a fraudulent report stating plaintiff was no longer disabled, and submit it to the magistrate as proof plaintiff was not entitled to benefits; the magistrate might be persuaded by the report and could then terminate his earlier award of benefits. Thus defendants' scheme could continue for ten or thirty years, or as long as Mr. Moon remained disabled, even if

the scheme applied only to Mr. Moon.[3]

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3. The WDCA provides that at any time during the disability, including after a magistrate's award of benefits to a claimant, a carrier or self-insured employer may send the claimant to a medical examination by a physician of its choice:

> MCL 418.385 Physical Examination of Employee.
>
> Sec. 385 After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or its carrer, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state...

If the doctor writes a report stating the claimant is no longer disabled, or disabled only because of a non-work-related condition, the carrier or self-insured employer may file a petition to stop benefits, pursuant to an administrative rule which provides

> R408.40 Stoppage, reduction or suspension of compensation.
>
> Rule 10. If compensation is being paid under an order or award of a magistrate or workers' compensation appellate commission, then compensation shall not be discontinued or reduced without a further order or award... A petition to stop compensation shall include... the following:
>
> ***
>
> (b) An affidavit stating that the employer has returned to gainful employment.... *or a signed statement from a physician stating the employee is able to return to employment.* [emphasis supplied]

A hearing is then held, and if the magistrate accepts the doctor's report, he will issue an order terminating benefits. If the magistrate rejects the doctor's report,

Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," §904(a) of Pub. L. No 91-452, 84 Stat. 947, 18 U.S.C. §note. "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v Imrex Co, Inc.*, 473 US 479 at 491 n. 10; 105 S Ct 3275 at 3283 n. 10; 87 L Ed 2d 346 at 356 n. 10. "The statute's remedial purposes are nowhere more in evidence than in the provision of a private action for those injured by racketeering activity." *Sedima,* supra, 473 US at 498, 105 S Ct at 3286, 87 L Ed 2d at 360. "Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope." *Tabas v Tabas,* 47 F3d 1280, 1297 (3rd Cir 1995).

The Sixth Circuit's rejection of Mr. Moon's suit conflicts with *Sedima's* encouragement of private actions, as well as with *H. J. Inc.'s* explication of the closed-ended "continuity" concept. *The Sixth Circuit's decision is not merely error, it demonstrates the need for the promised further development of the concept of closed-ended continuity.*

C. RELAXATION OF FRAUD PLEADING

Rotella, supra, held that Rule 9's requirement of pleading fraud with particularity should be "relaxed" where plaintiff invokes Rule 11(b)(3). In paragraph 15 of his First Amended Complaint, plaintiff invoked that rule:

> On information and belief, one or more

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the claimant continues to receive benefits, but the insurer or self-insured employer may again require the claimant to submit to examination, pursuant to MCL 418.385, and another petition to stop may be filed. The cycle may continue for the worker's lifetime.

> members of the enterprise engaged in similar acts to defraud other persons of their workers compensation benefits. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

This invocation of Rule 11(b)(3) should have been sufficient to prevent dismissal on the ground plaintiff failed to allege continuity. Although the flaw which the trial court and Court of Appeals found in plaintiff's complaints was not lack of particularity in describing dates and addresses of mailings, the lower courts did not abide by the principle implied by *Rotella - that courts should not be quick to dismiss RICO fraud pleadings where plaintiff requests discovery under Rule 11(b)(3) to gather proof sufficient to state a civil RICO claim for fraud.* The Sixth Circuit's dismissal reveals a need for this Court to state that principle plainly, not merely by implication.

Certainly, if the initial complaint is so barren of allegations that no reasonable discovery would lead to an actionable RICO case for fraud, dismissal under Rule 12(b)(6) is proper. But where, as here, plaintiff has alleged several predicate acts against himself and asserts defendants committed predicate acts against others, dismissal under that Rule is hasty, and in violation of the intent if not the exact words of both Rule 11(b)(3) and *Rotella*.

Had plaintiff been given the opportunity for discovery, he may have discovered frauds similar to those allegedly perpetrated against him, sufficient in quantity and time span to demonstrate closed- or open-ended continuity, or both.

Consonant with *Rotella* and Rule 11(b)(3), the Court should plainly state a rule that civil RICO fraud complaints should not be dismissed for failure to allege continuity where a plaintiff seeks discovery of frauds against others similar to those allegedly perpetrated

against him. Such a rule is consonant with the liberal construction of RICO mandated by Congress.

RELIEF REQUESTED

Timothy Moon requests this court to grant this petition for certiorari, or to summarily reverse the Court of Appeals and hold his First and Second Amended Complaints alleged civil RICO causes of action for mail and wire fraud against defendants, and to reverse the dismissal entered by the trial court and affirmed by the court of appeals.

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Marshall Lasser
Attorney for petitioner

Dec. 19, 2006